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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 659

CENTRAL HANOVER BANK AND TRUST COMPANY, A BANKING CORPORATION OF THE STATE OF NEW YORK, GEORGE CHEW ATKINS AND JOHN NORTON ATKINS, AS EXECUTORS, ETC., ET AL.,

Appellants,

vs.

WILLIAM D. KELLY, STATE TAX COMMISSIONER OF NEW JERSEY.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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No. 659

CENTRAL HANOVER BANK AND TRUST COMPANY, A BANKING CORPORATION OF THE STATE OF NEW YORK, GEORGE CHEW ATKINS AND JOHN NORTON ATKINS, AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF GEORGE W. E. ATKINS, DECEASED, AND GEORGE CHEW ATKINS AND JOHN NORTON ATKINS, INDIVIDUALLY,

Appellants,

vs.

J. H. THAYER MARTIN, STATE TAX COMMISSIONER (WILLIAM D. KELLY, SUCCESSOR),

Appellee.

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS.

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTIONS TO AFFIRM OR DISMISS.

Nature of Case.

Appellants seek review of a judgment of the New Jersey Court of Errors and Appeals upholding an assessment of transfer inheritance taxes on a certain *inter vivos* transfer

in trust. They allege that the New Jersey inheritance tax law under which the tax was levied is repugnant to the Fourteenth Amendment to the Constitution of the United States because (a) the intangible personal property, the transfer of which was subjected to tax, did not have a taxable situs within the state at the time of transfer; (b) the transfer occurred outside the state; (c) the agreement of trust effectuating the transfer was executed outside the state; and (d) the trustee and beneficiaries were domiciled outside the state.

Statement of Facts.

1. George W. E. Atkins, the donor, died testate November 9, 1936 (State of Case before the New Jersey Court of Errors and Appeals, p. 17—hereinafter referred to simply as the "S. C.").

2. On May 16, 1929 the donor, at the age of 79 (S. C. 71), and concurrently with the signing of his last will and testament (S. C. 26), executed an agreement of trust under which he conveyed approximately two-thirds of his estate in trust, the income therefrom to be paid to him for his life, and on his death to pay said income, less $2,400 annually for each of his two sons, to his wife, for her life, if she survived him (which she did not), the corpus on the death of the survivor of himself and his wife to be divided equally between his two sons, with further provisions for disposition should either or both of his sons not then be living. (S. C. 27-35).

3. No power to alter, amend, revoke or appoint the trust was reserved to the donor.

4. The agreement was executed in the City and State of New York (S. C. 39); the trustee, Central-Hanover Bank and Trust Company, is a banking corporation of that state (S. C. 38); and the two sons are nonresidents of the State of New Jersey. (S. C. 19).

5. The assets comprising the corpus of the trust were at all material times intangible personal property physically present in the State of New York, being securities which, from about May 15, 1924, had been in the custody of the Central Union Trust Company of New York City, predecessor of appellant, the Central Hanover Bank and Trust Company, and the latter, in a safe-keeping account in the donor's name, and they remained in that state to the date of the donor's death (S. C. 35, 39).

6. The donor was legally domiciled in the State of New Jersey at the time of the creation of the trust, during all of the time intervening the execution of the trust and the date of his death, and at the time of his death (S. C. 29, 35, 36, 38).

7. The State Tax Commissioner determined that the corpus of this *inter vivos* trust constituted a part of the taxable estate of the decedent for inheritance tax purposes because the transfer thereof was intended by the donor to take effect in beneficial possession and enjoyment at or after his death, within the intendment of the transfer inheritance tax laws[1] of the State of New Jersey, and that the transfer

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[1] Chapter 228, Laws of New Jersey 1909, section 1, subsection "Third", effective July 4, 1909, as amended by Chapter 144, Laws of 1929, effective April 22, 1929, provided that:

"A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars ($500) or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, exempt as hereinafter provided, in the following cases:

* * * * * * * *

"Third: When the transfer is of property made by a resident, * * * by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death. * * *"

And Chapter 303, Laws of 1931, Chapter 244, Laws of 1934 and Chapter 89, Laws of 1935 (now R. S. 54:34-1c) continued this provision in identi-

of said intangible personal property was within the power of this state to tax, notwithstanding the physical presence of said property in the hands of the donor's agent and trustee in the State of New York at the time of the creation of the trust and the date of his death.

8. The Prerogative Court, to which taxpayers appealed (R. S. 54: 34-13), ruled that the transfers arising out of this *inter vivos* trust were taxable not only as gifts intended to take effect in beneficial possession or enjoyment at or after the donor's death, but also as gifts made by the donor in contemplation of his death, and that the transfer of the property comprising the corpus of the trust was within the taxing power of this state (129 N. J. Eq. 186—S. C. 95; 198, 110).

9. The Supreme Court, in a *per curiam*, affirmed the decree of the Prerogative Court for the reasons stated by Vice-Ordinary Buchanan, who advised the decree below (127 N. J. Law 468—S. C. 133).

10. And the Court of Errors and Appeals affirmed the judgment of the Supreme Court on the same grounds (129 N. J. Law 127—Transcript of Record.

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cal language down to the date of the decedent's death on November 9, 1936.

Chapter 228, Laws of 1909, section 26 (now R. S. 54:33-1) further provided that:

> "26. The words 'estate' and 'property', wherever used in this act, except where the subject or context is repugnant to such construction, shall be construed to mean the interest of the testator, intestate, grantor, bargainor or vendor, passing or transferred to the individual or specific legatee, devisee, heir, next of kin, grantee, donee or vendee, not exempt under the provisions of this act, *whether such property be situated within or without this state*. The word 'transfer', as used in this act, shall be taken to include the passing of property, or any interest therein, *in possession or enjoyment, present or future*, by distribution by statute, descent, devise, bequest, grant, *deed*, bargain, sale or *gift*."
>
> [All emphasis herein by appellee.]

11. It was determined by the Prerogative Court (129 N. J. Eq. 208—S. C. 110), and approved by both appellate courts that the taxable transfers occurred on the execution and delivery of the trust agreement, and since at that time the donor was legally domiciled in New Jersey and the property transferred was intangible in nature, this state had the power to tax, notwithstanding the interests so transferred could not vest in the particular beneficiaries until at or after the donor's death.

12. The statute under which New Jersey claims a tax took effect July 4, 1909 (Chapter 228, Laws of New Jersey, 1909, as amended) many years prior to the date of the transfer, which occurred on May 16, 1929.

13. The only question on this appeal is whether the State of New Jersey, without violating the due process and equal protection of the law clauses of the Federal Constitution, may subject to inheritance taxation the transfer, by a person legally domiciled in this state, of intangible personal property, where that intangible personal property has a physical situs elsewhere, the trustee and the beneficiaries for whose benefit the transfers were made are legally domiciled in another state or states, and the estates of the beneficiaries are dependent for their possession and enjoyment upon the happening of future events.

14. Because the determination of this issue by the Courts of New Jersey seems to be so clearly supported by the decisions of this Court, appellee, by motions included herein, moves that the judgment of the Court of Errors and Appeals be summarily affirmed, or, in the alternative, that the appeal allowed herein be dismissed, for the following reasons:

I.

Reasons in Support of Motion to Affirm Judgment of the Court of Errors and Appeals.

1. The judgment under review should be affirmed on the specific authority of

Pearson v. *McGraw*, 308 U. S. 313;
VanDyke v. *Wisconsin Tax Commission*, 311 U. S. 605;

and on the applicable legal principles announced by this Court in

Curry v. *McCanless*, 307 U. S. 357;
Graves v. *Elliott*, 307 U. S. 383;
Graves v. *Schmidlapp*, 315 U. S. 657 (Prel. Print);
Blodgett v. *Silberman*, 277 U. S. 1.

Pearson v. *McGraw*, *supra*, is indistinguishable from the instant matter on the controlling facts and legal principles involved. In that case the donor was domiciled in the State of Oregon at the time of the transfer and the date of his death; the subject-matter of the transfer had for several years been in the custody of an Illinois trust company as donor's agent in collecting principal and income and reinvesting funds; and on August 15, 1935, about six months before death and in contemplation thereof, he transferred the property then in the hands of the trust company, as his agent, to the trust company, as trustee, under an agreement of trust executed in Oregon on that date. The right of the State of Oregon to an inheritance tax on the transfer was upheld by this Court on the authority of *Curry* v. *McCanless*, *supra*, and related cases, notwithstanding the fact that the donor did not reserve a power to alter, amend or revoke the trust agreement, or appoint the trust estate. True, it appears that the trust agreement in that case was actually executed by the donor in the State of Oregon, while here

the agreement was executed in New York, but that is a distinction of no significance in view of this Court's subsequent ruling in *VanDyke* v. *Wisconsin Tax Commission*, *supra*, where the trust of a Wisconsin donor was executed in Illinois and a Wisconsin gift tax on the transaction was sustained on the authority of *Pearson* v. *McGraw*, *supra*, although the gift of approximately seven and one-half tons of silver dollars was actually consummated in Illinois. As Justice Stone said in *Curry* v. *McCanless*, *supra* (at p. 368):

> "* * * it is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax * * *."

Consequently, it is wholly immaterial that the trust instrument was executed and the securities delivered by the donor to the trustee in the State of New York. *Pearson* v. *McGraw* and *VanDyke* v. *Wisconsin Tax Commission*, *supra*, conclusively foreclose every contention of appellants here and justify summary affirmance of the judgment under review.

2. Jurisdiction to tax in the instant case is predicated not upon the fact of physical presence here of the donor's property, but upon the dominion and control of New Jersey over the donor—the property transferred being intangible. Domicile of the owner of intangible personal property within the taxing state in itself affords an adequate constitutional basis for imposing a tax on his testamentary or *inter vivos* transfer of said property even though it be physically located without the taxing state.

> "* * * A jurisdiction which does not depend on physical presence within the state is not lost by declaring that it is absent. *From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis*

for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. Until this moment that jurisdiction has not been thought to depend on any factor other than the domicile of the owner within the taxing state, or to compel the attribution to intangibles of a physical presence within its territory, as though they were chattels, in order to support the tax."

Curry v. *McCanless*, *supra* (at pp. 366, 367).

". . . For constitutionally the property was 'within the jurisdiction of the state' of Oregon *since that jurisdiction is dependent not on the physical location of the property in the state but on control over the owner.*"

Pearson v. *McGraw*, *supra* (at p. 318).

". . . As in the case of any other intangibles which she possessed, control over her person and estate at the place of her domicile and her duty to contribute to the support of government there afford adequate constitutional basis for imposition of a tax measured by the value of the intangibles transmitted or relinquished by her at death. *Curry* v. *McCanless*, *supra*, and cases cited."

Graves v. *Elliott*, *supra* (at p. 387).

3. Equally well settled by the decisions of this Court is the fact that it is wholly immaterial whether the intangibles transferred by the donor in trust had, prior to the transfer, acquired a business situs in the State of New York, since the power of the state of business situs to tax cannot deprive the state of domicile of the owner of the intangibles of its power to tax their transfer.

Curry v. *McCanless*, *supra* (at pp. 367-368);

Graves v. *Elliott*, *supra*;

Graves v. *Schmidlapp*, *supra* (at p. 661).

Although it should be observed that the State of New York for a long time has had no statute for the taxation of the

transfer of intangibles of nonresidents; in fact, by a Constitutional amendment effective January 1, 1939 (Art. XVI, sec. 3) that state has precluded taxation under circumstances such as exist in the instant matter.

4. It is immaterial that the trustee and beneficiaries of the trust were not residents of the State of New Jersey, or that the trust *res* was physically present in the State of New York.

Kenney v. *New York*, 322 U. S. 525, 537;
Graves v. *Schmidlapp*, *supra*, (at p. 661).

5. In disposing of this case each of the New Jersey courts ruled (a) that the taxable transfers occurred when the deed of trust was executed and delivered (S. C. 116); (b) that the transfers pursuant to the deed were made in contemplation of and intended to take effect in possession and enjoyment at or after the death of the donor (S. C. 95); (c) that the inheritance tax laws of this state (Chapter 228, Laws of 1909, section 1, as amended to the date of the trust) specifically provide for the taxation of *inter vivos* transfers so made; and (d) that said laws extend the power to tax to intangible personal property wherever situated when owned by a resident transferor. These characterizations of the transfers and the interpretation of the scope of the tax law of New Jersey by its courts will be accepted as conclusive here; the only question being whether the transfers as so construed and the law as so applied violate any provision of the Constitution of the United States.

Saltonstall v. *Saltonstall*, 276 U. S. 260, 270, and cases there cited.

6. As previously observed, each of the New Jersey courts ruled that the taxable event occurred in 1929 when the deed was executed, and that liability to tax then attached. In this they plainly acted properly, since this Court long ago ruled

that the validity of the burden of the tax must be determined by the situation as it exists when the deed is made.

Keeney v. *New York*, *supra* (at p. 537).

7. Where the power to tax exists it is for the state to say when and how the amount of the tax shall be ascertained and paid. That the transfers were valued and the tax assessed as of the date of death of the donor, while liability for the tax attached when the transfer was made in 1929, presents no federal question.

> "* * * The fact that the assessment and payment were postponed until the death of the grantor would be a benefit to a remainderman in the many instances in which values decreased. But where the power to tax exists, it is for the State to fix the rate and to say when and how the amount shall be ascertained and paid. The fact that the liability was imposed when the transfer was made in 1903, and that payment was not required until the death of the grantor in 1907, does not present any Federal question."
>
> *Keeney* v. *New York*, *supra* (at p. 537).

> "* * * The due process clause places no restriction on a State as to the time at which an inheritance tax shall be levied or the property valued for purposes of such tax. Compare *Cahen* v. *Brewster*, 203 U. S. 543."
>
> *Salomon* v. *State Tax Commission*, 278 U. S. 484, 490.

8. The applicable inheritance tax law of the State of New Jersey is Chapter 228, Laws of 1909, section 1, as amended to the date of the execution of the deed of trust. The trust deed was not executed until 1929, so that we are not here confronted with the question of constitutionality of an attempt to retroactively apply the tax law, and, therefore, cases such as *Coolidge* v. *Long*, 282 U. S. 582, and *Binney* v. *Long*, 299 U. S. 280, cited by appellants at page 14 of their jurisdictional statement, are without controlling effect.

9. That the property transferred *inter vivos* was not owned by the donor at the moment of his death is without controlling effect on the question of jurisdiction to tax.

Whitney v. *State Tax Commission of New York*, 309 U. S. 530, 538-540.

10. It is respectfully submitted that the judgment of the Court of Errors and Appeals should be summarily affirmed on motion, since the issues here involved have been so plainly foreclosed by the determination of this Court in *Pearson* v. *McGraw*, *VanDyke* v. *Wisconsin Tax Commission*, *Curry* v. *McCanless*, and *Graves* v. *Elliott*, *supra*, as to render further argument wholly unnecessary.

II.

Reasons in Support of Motion to Dismiss the Appeal.

1. The presence of a *substantial* federal question is essential to sustain jurisdiction in this Court. If the questions pleaded are plainly unsubstantial, jurisdiction is wanting.

Levering and Garrigues Co. v. *Morrin*, 289 U. S. 103, 105.

A claim of unconstitutionality is unsubstantial where (a) it is "obviously without merit", or (b) "its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy."

Ex Parte Poresky, 290 U. S. 30, 32.

Levering and Garrigues Co. v. *Morrin*, *supra* (at pp. 105, 106).

2. That every constitutional issue attempted to be raised by the petition herein has been explicitly foreclosed by the previous decisions of this Court, as set forth in Point I, seems quite apparent. Specifically, *Pearson* v. *McGraw*, and *VanDyke* v. *Wisconsin Tax Commission*, *supra*, leave no room for the inference that the questions sought to be raised and presented for further consideration can be the subject of further controversy.

3. It is respectfully submitted, therefore, that the constitutional questions urged by appellants have been so plainly foreclosed by the decisions of this Court as to leave no room for real controversy, and the appeal (if not affirmed) should be dismissed for want of a substantial federal question.

Equitable Life Assurance Society v. *Brown*, 187 U. S. 308, 311.

Zucht v. *King*, 260 U. S. 174, 176.

McArthur v. *United States*, 315 U. S. 787 (Prel. Print).

Motion to Affirm Judgment of the New Jersey Court of Errors and Appeals.

Therefore, comes now the appellee herein, successor to J. H. Thayer Martin, State Tax Commissioner, by his attorney, and moves the Court to affirm the judgment from which the appeal in the above entitled cause has been taken, on the ground that it is manifest that every question on which the decision of the cause depends has been so explicitly foreclosed by the previous decisions of this Court as to render further argument thereof unnecessary.

In the alternative:

Motion to Dismiss the Appeal.

Therefore, comes now the appellee herein, successor to J. H. Thayer Martin, State Tax Commissioner, by his attorney, and moves the Court to dismiss the appeal for want of a substantial federal question.

DAVID T. WILENTZ,
Attorney General of New Jersey,
Attorney for Appellee.
WILLIAM A. MOORE,
Of Counsel.

Dated: December 29, 1942.